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7 FERRERO U.S.A, INC.

8 UNITED STATES DISTRICT COURT  
9  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 ATHENA HOHENBERG, individually and on )  
behalf of all others similarly situated, )

12 Plaintiffs, )

13 )  
14 v. )

15 FERRERO U.S.A., INC., a foreign corporation, )

16 Defendant. )

17 )  
18 )  
19 LAURA RUDE-BARBATO, on behalf of herself )  
and all others similarly situated, )

20 Plaintiffs, )

21 )  
22 v. )

23 FERRERO U.S.A., INC., )

24 Defendant. )  
25 )  
26 )  
27 )  
28 )

CASE NO.: 11 CV 0205 (H CAB)

DEFENDANT FERRERO U.S.A.,  
INC.'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF ITS MOTION TO TRANSFER  
VENUE TO THE DISTRICT OF NEW  
JERSEY PURSUANT TO 28 U.S.C.  
§ 1404(a)

Date: May 2, 2011

Time: 10:30 AM

Before: Hon. Marilyn L. Huff



**DEFENDANT FERRERO U.S.A., INC.’S MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER VENUE TO THE  
DISTRICT OF NEW JERSEY PURSUANT TO 28 U.S.C. § 1404(a)**

Defendant Ferrero U.S.A., Inc. (“Ferrero U.S.A.” or the “Company”) respectfully submits this Memorandum of Points and Authorities in Support of its Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a).

**INTRODUCTION**

Between February 1, 2011 and March 4, 2011, Ferrero U.S.A. was served with four consumer class action complaints related to one of its products, Nutella® – a hazelnut spread which is used by consumers for a variety of eating occasions, including spread on toast at breakfast. Two of those actions, which were filed in this judicial district, were recently consolidated by the Court following stipulation of the parties. The third and fourth complaints are pending in New Jersey – one in the United States District Court for the District of New Jersey and one in New Jersey Superior Court – *i.e.*, the federal and state judicial districts in which Ferrero U.S.A. is headquartered.

Although pending in different courts, each complaint asserts the same core allegations, *i.e.*, that the product label and advertisements for Nutella® are false and misleading because, according to plaintiffs, the challenged statements assert that Nutella® is “healthy” and “nutritious” when it is not. Each plaintiff asserts causes of action under the consumer protection statutes of the respective forum, along with causes of action for breach of contract, breach of express warranty, and breach of implied warranty of merchantability, and each plaintiff is seeking to represent overlapping classes of Nutella® consumers. Consolidating the parallel federal actions will avoid the unnecessary costs and burdens (to the parties, witnesses and courts) associated with duplicative litigation that may result in inconsistent or conflicting outcomes.

Ferrero U.S.A. respectfully submits that the District of New Jersey is the appropriate forum for this litigation given the factual nexus of the case and because transfer to that judicial district will result in the greatest convenience for the parties and witnesses, most of whom are located there. The Southern District of California has within its borders neither the evidence nor the relevant witnesses in connection with this action – the District of New Jersey does. Because



the District of New Jersey is more convenient for the parties and witnesses and because transfer would serve the interest of justice, Ferrero U.S.A. respectfully requests that the Court transfer this case to the United States District Court for the District of New Jersey.

### **BACKGROUND**

Ferrero U.S.A. is a Delaware corporation that sells several popular food products in the United States, including Nutella® hazelnut spread, Tic Tac® mints, and Ferrero Rocher® fine hazelnut chocolates. Declaration of Bernard F. Kreilmann in Support of Defendant's Motion to Transfer Venue to the District of New Jersey Pursuant to 28 U.S.C. § 1404(a) ("Kreilmann Decl.") ¶¶ 2-3. Ferrero U.S.A.'s principal place of business, *i.e.*, its corporate headquarters, is located in Somerset, New Jersey. *Id.* All of Ferrero U.S.A.'s executives and corporate employees, including its employees responsible for the marketing, advertising and labeling of Nutella® hazelnut spread, work at the Company's New Jersey headquarters. Outside of New Jersey, Ferrero U.S.A. employs 159 field sales personnel (including 96 part time employees) who are located throughout the United States, including 15 field sales personnel in California.<sup>1</sup>

On February 1, 2011, Plaintiff Athena Hohenberg filed a class action against Ferrero U.S.A. in this Court in which she alleges the labeling and advertising for Nutella® violate (1) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (2) California's False Advertising Law, ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; (3) California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (4) express warranty; and (5) implied warranty of merchantability. Hohenberg Docket Number ("Dkt. No.") 1. On February 4, 2011, Plaintiff Laura Rude-Barbato filed a second class action against Ferrero U.S.A. in this Court alleging (1) violations of California's UCL; (2) violations of California's FAL; (3) violations of California's CLRA; (4) breach of express warranty; (5) breach of implied warranty of merchantability; and (6) violations of the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8 *et seq.* Rude-Barbato Dkt. No. 1.

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<sup>1</sup> Nutella® is distributed in the United States using third party distributors at various facilities, including one that is operated out of Ferrero U.S.A.'s New Headquarters (600 Cottontail Lane, Somerset, New Jersey), one that is located in Illinois, and one that is located in Ontario, California.



On February 28, 2011, the plaintiffs in both actions filed a motion to consolidate cases and appoint interim lead co-class counsel, (Hohenberg Dkt. No. 8.), which the Court granted on March 22, 2011. Plaintiffs filed their “Master Consolidated Complaint” (“Consolidated California Compl.”) the following day. As noted in its response to plaintiffs’ motion to consolidate, however, Ferrero U.S.A. has been served with two additional class action complaints in its home state of New Jersey – one in the District of New Jersey (*Glover v. Ferrero USA, Inc.*, Case No. 3:11-cv-01086) (“Glover”) and one in New Jersey Superior Court. By way of this motion, Ferrero U.S.A. is seeking to transfer this action to the District of New Jersey for consolidation with *Glover*.

At their core, the California and New Jersey complaints both allege that the product labeling and advertising campaigns for Nutella® falsely claim the product is “nutritious” and “healthy” (Consolidated California Compl. ¶ 3; Glover Compl. ¶¶ 8-9) and fails to adequately disclose the presence and/or effect of saturated fats, sugar, oil, and artificial flavoring (Consolidated California Compl. ¶¶ 88-89; Glover Compl. ¶¶ 10-12, 21).

For example, both complaints allege that the statement “An example of a tasty yet balanced breakfast: a glass of skim milk, orange juice and Nutella® on whole wheat bread” on the product label for Nutella® is false and misleading. *Compare* Glover Compl. ¶ 24 (alleging that the Nutella® label “omits that (a) the ‘balanced breakfast’ is derived from the other foods or drinks which are depicted on the label; (b) Nutella® contains high levels of saturated fat; and (c) Nutella® contains over 55% processed sugar”) with Consolidated California Complaint ¶ 77 (“Nutella®’s product labels are deceptive because they falsely suggest that Nutella® is the key element that makes the depicted breakfast ‘balanced’ or nutritious when in fact it is the other food items such as milk, juice, fruit and bread that provide the nutrients and healthy qualities that Nutella® is touting.”). And each challenge the television advertisements for Nutella® (Consolidated California Compl. ¶¶ 90-96; Glover Compl. ¶¶ 26-49) along with various images and representations that have appeared in print advertisements or on the Nutella® website (Consolidated California Compl. ¶¶ 70-89; Glover ¶¶ 50-67).



1 Finally, each plaintiff purports to represent a nationwide class of Nutella® consumers  
 2 (Consolidated California Compl. ¶¶ 119-28; Glover Compl. ¶¶ 82-90) and the two complaints  
 3 seek identical relief (Consolidated California Compl. pp. 38-39; Glover Compl. pp. 22-23) under  
 4 the consumer protection laws of California and New Jersey, respectively.<sup>2</sup>

### 5 ARGUMENT

6 The District of New Jersey is the most appropriate venue for these actions.<sup>3</sup> Where, as  
 7 here, both the original and requested venue are proper, a motion to transfer is governed by  
 8 Section 1404(a), which provides, “[f]or the convenience of [the] parties and witnesses, in the  
 9 interest of justice, a district court may transfer any civil action to any other district or division  
 10 where it might have been brought.” 28 U.S.C. § 1404(a). The purpose of Section 1404(a) is to  
 11 “prevent the waste ‘of time, energy, and money’ and ‘to protect litigants, witnesses and the  
 12 public against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612,  
 13 616 (1964) (citation omitted). The decision to transfer venue under Section 1404(a) lies within  
 14 the discretion of the trial court. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir.  
 15 2000).

16 In considering a motion to transfer brought under Section 1404(a), courts weigh multiple  
 17 factors to determine (1) whether the transferee district is one where the action might have been  
 18 brought; (2) whether transferring the action will promote the interest of justice; and (3) which  
 19 judicial district would further the convenience of parties and witnesses. *See A.J. Indus. v. U.S.*  
 20 *Dist. Court for Cent. Dist.*, 503 F.2d 384, 386-87 (9th Cir. 1974); *Multimedia Patent Trust v.*  
 21 *Tandberg, Inc.*, No. 09-CV-1377, 2009 WL 3805302, at \*3 (S.D. Cal. Nov. 12, 2009) (“Under

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22  
 23 <sup>2</sup> Notably, the Rude-Barbato complaint originally contained a cause of action under New Jersey  
 24 law, which was removed from the Consolidated California Complaint after Ferrero informed the  
 parties and Court that it would be filing this motion.

25 <sup>3</sup> 28 U.S.C. § 1391(b) provides that “a civil action wherein jurisdiction is not founded solely on  
 26 diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a  
 27 judicial district where any defendant resides, if all defendants reside in the same State, (2) a  
 28 judicial district in which a substantial part of the events or omissions giving rise to the claim  
 occurred, or a substantial part of property that is the subject of the action is situated, or (3) a  
 judicial district in which any defendant may be found, if there is no district in which the action  
 may otherwise be brought.”



1 28 U.S.C. § 1404, a district court ‘may transfer any civil action to any other district or division  
2 where it might have been brought’ ‘for the convenience of parties and witnesses’ and ‘in the  
3 interest of justice.’”) (citation omitted).

4 **A. The Action Could Have Been Brought In the District of New Jersey**

5 This action could have been brought in the District of New Jersey because that district  
6 has subject matter jurisdiction over this action, personal jurisdiction over the defendant, and  
7 venue would have been proper. *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960); *Commercial*  
8 *Lighting Prods., Inc. v. U.S. Dist. Court*, 537 F.2d 1078, 1079-80 (9th Cir. 1976); *see also* 28  
9 U.S.C. § 1391. The District of New Jersey has subject matter jurisdiction over the claims (for  
10 the same reasons the action was filed in this Court, including jurisdiction under the Class Action  
11 Fairness Action) and personal jurisdiction over Ferrero U.S.A., given its presence in that state.

12 In addition to jurisdiction, the District of New Jersey would have been a proper venue for  
13 this action. Venue is deemed proper in “(1) a judicial district where any defendant resides, if all  
14 defendants reside in the same State, (2) a judicial district in which a substantial part of the events  
15 or omissions giving rise to the claim occurred, or (3) a judicial district in which any defendant  
16 may be found, if there is no district in which the action may otherwise be brought.” 28 U.S.C. §  
17 1391(b)(1)-(3). Here, Ferrero U.S.A. resides in New Jersey;<sup>4</sup> its corporate headquarters is  
18 located there and many of the purported events giving rise to plaintiffs’ claims, along with the  
19 relevant witnesses, are located in New Jersey. Venue in New Jersey, therefore, would have been  
20 proper under Section 1391(b)(1) or (b)(2).

21 **B. The Interest Of Justice and Convenience of the Parties and Witnesses Each**  
22 **Weigh in Favor of Transfer to the District of New Jersey**

23 Because the action “could have been brought” in the District of New Jersey, the Court  
24 must next determine whether the interest of justice along with the convenience of the parties and  
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26 <sup>4</sup> A defendant that is a corporation “shall be deemed to reside in any judicial district in which it is  
27 subject to personal jurisdiction at the time the action is commenced. . . . [S]uch corporation shall  
28 be deemed to reside in any district in that State within which its contacts would be sufficient to  
subject it to personal jurisdiction if that district were a separate State, and, if there is no such  
district, the corporation shall be deemed to reside in the district within which it has the most  
significant contacts.” 28 U.S.C. § 1391(c).



witnesses weigh in favor of transferring this action to that judicial district. In making that determination, courts weigh multiple factors, such as: the pendency of related actions; the location where the relevant agreements were negotiated and executed; the state that is most familiar with the governing law; plaintiff's choice of forum; the respective parties' contacts with the forum; the contacts relating to plaintiff's cause of action in the chosen forum; the unfairness of imposing jury duty on citizens in a forum unrelated to the action; the differences in the costs of litigation in the two forums; the availability of compulsory process to compel attendance of unwilling non-party witnesses; and the ease of access to sources of proof. *See, e.g., Jones*, 211 F.3d at 498-99; *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

### 1. **Transfer Would Promote the Interest of Justice**

The "interest of justice" consideration is "the most important factor a court must consider, and may be decisive in a transfer motion even when all other factors point the other way." *Gerin v. Aegon USA, Inc.*, No. C 06-5407, 2007 WL 1033472, at \*6 (N.D. Cal. Apr. 4, 2007); *see also Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) ("Consideration of the interest of justice, which includes judicial economy, 'may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result.'") (citation omitted); *Deatley v. Howard*, No. C 07-1145, 2007 WL 2463297, at \*3 (W.D. Wash. Aug. 27, 2007) ("The interest of justice is the most important factor of all.").

Here, the "interest of justice" weighs in favor of transfer given the pendency of substantially similar actions in the transferee forum. *See A.J. Indus.*, 503 F.2d at 389 ("The feasibility of consolidation is a significant factor in a transfer decision, although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties.") (internal citation omitted); *Cont'l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was



1 designed to prevent.”). The key inquiry is “not whether identical causes of action have been pled  
2 in the two actions but whether they hinge upon the same factual nuclei.” *See, e.g., Dahl v. HEM*  
3 *Pharms. Corp.*, 867 F. Supp. 194, 197 (S.D.N.Y. 1994) (internal quotation marks, emphasis and  
4 citations omitted).

5 As described above, the pending cases in this Court and in the District of New Jersey  
6 unquestionably “hinge upon the same factual nuclei” and the presence of a related action weighs  
7 in favor of transfer for the same reasons set forth in this Court’s March 22, 2011 Order  
8 consolidating the two California cases. *See Hohenberg Dkt. No. 7* at 3 (“[t]he two cases involve  
9 sufficient common questions of law and facts such that efficiency would be enhanced by their  
10 consolidation, as each allege economic injuries based on the deceptive and misleading labeling  
11 on Ferrero’s Nutella® spread. . . . In addition because the related actions are based on the same  
12 facts and involve the same subject matter, the same discovery will be relevant to both lawsuits.  
13 Consolidation is appropriate to save time and effort and will not produce inconvenience, delay,  
14 or expense on the litigants or trial judge.” *See Huene v. United States*, 743 F.2d 703, 704 (Cal.  
15 1984)).

16 In considering the “interests of justice,” the Court may also consider the relative interests  
17 of the two forum states in the litigation. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, No. CV  
18 06-4871, 2006 WL 4568798, at \*6 (C.D. Cal. Nov. 30, 2006). Where, as here, cases in  
19 California did not involve a “localized controversy,” and no issues or contacts unique to  
20 California exist, courts have recognized that other venues may have greater interests, justifying  
21 transfer. *See id.* (transferring case where “[t]here is no unique contact between California and  
22 the action”). Although California has an interest in protecting its residents and providing a  
23 forum for resolution of their disputes, New Jersey’s interest in the affairs of its corporate resident  
24 is much greater.

25 Moreover, to the extent that California has an interest in hearing the claims of its  
26 residents, courts have found transfer to be appropriate nevertheless where, as in this case, the  
27 interest of the state arises merely out of the local residence of the plaintiffs, and their  
28 corresponding purchase of the items in question. *See Gerin*, 2007 WL 1033472, at \*6 (granting



1 motion to transfer to the Middle District of Florida, where plaintiffs’ only basis for filing suit in  
 2 California was that they “reside here and purchased their annuities here”). Finally, whether the  
 3 case is litigated in New Jersey or California, the courts will need to decide choice of law issues.  
 4 At their core, both cases assert violations of state consumer laws and either court is certainly  
 5 capable of applying consumer laws of various states.

6 Thus, the factor assessing the contacts relating to plaintiff’s cause of action in the chosen  
 7 forum, and the relative interests of the two forum states in the litigation, weigh in favor of  
 8 transferring the case to New Jersey.

## 9 **2. Transfer Would Promote the Convenience of the Parties and** 10 **Witnesses**

11 Transferring this action to the District of New Jersey would promote the convenience of  
 12 the parties and witnesses under § 1404(a). The District of New Jersey is plainly a more  
 13 convenient forum for the parties given that Ferrero U.S.A.’s headquarters, the relevant  
 14 employees and third parties reside in that district. Kreilmann Decl. ¶¶ 2-6.

15 With respect to the convenience of the named plaintiff, the Ninth Circuit has held that in  
 16 class actions like this, “the named plaintiff’s choice of forum is given less weight” than in other  
 17 contexts. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987).<sup>5</sup> Moreover, “[i]f the operative  
 18 facts have not occurred within the forum . . . [the plaintiff’s] choice is entitled to only minimal  
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23 <sup>5</sup> See also *Gerin*, 2007 WL 1033472, at \*7 (“[T]he plaintiffs’ choice of forum is given little  
 24 deference where, as here, the action is brought on behalf of a class.”); *Alexander v. Franklin*  
 25 *Res., Inc.*, No. C 06-7121, 2007 WL 518859, at \*3 (N.D. Cal. Feb. 14, 2007) (“[P]laintiffs’  
 26 choice of forum is less significant where the plaintiff purports to represent a nationwide class.”);  
 27 *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1157 (S.D. Cal. 2005) (“[T]he Ninth Circuit, like  
 28 other courts, has noted that the weight to be given the plaintiff’s choice of forum is discounted  
 where the action is a class action.”); but see *Milton v. TruePosition, Inc.*, 2009 WL 323036, at \*2  
 (N.D.Cal. 2009) (finding plaintiffs’ choice of forum should be accorded “some deference” where  
 brought in plaintiffs’ home forum).



consideration.” *Lou*, 834 F.2d at 739 (affirming transfer to Southern District of New York).<sup>6</sup> Where this is the case, “defendants have less of a burden of demonstrating that a transfer is warranted than they might otherwise have.” *Saleh*, 361 F. Supp. 2d at 1167.<sup>7</sup> Since plaintiffs here are bringing class action claims, and given that the challenged conduct occurred in New Jersey, plaintiffs’ choice of forum is entitled to less deference than it might otherwise. *In re Yahoo!*, 2008 WL 707405, at \*8 (C.D.Cal. March 10, 2008) (“defendants’ alleged misrepresentations and omissions . . . are deemed to ‘occur’ in the district where they are transmitted or withheld, not where they are received.”). Thus, the factor considering plaintiffs’ choice of forum does not weigh in favor of maintaining the case in this District.

New Jersey is also more convenient for probable witnesses. This factor is of particular significance in considering whether to transfer. 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3851, at 415-17 (2d ed. 1986) (“Probably the most important factor . . . is the convenience of witnesses. If the forum chosen by plaintiff will be most convenient for the witnesses, this is a powerful argument against transfer, while if some other forum will better serve the convenience of witnesses, transfer is likely to be granted”). Plainly, the key witnesses in this action are located in New Jersey (or elsewhere on the east coast) while none (besides plaintiffs themselves) are located in California.

Finally, the availability of compulsory process to compel attendance of unwilling non-party witnesses also weighs in favor of transfer. If the case were to remain in California, this

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<sup>6</sup> See also *Diego, Inc. v. Gemstar-TV Guide Int’l, Inc.*, No. C 06-1417, 2007 WL 295539, at \*3 (W.D. Wash. Jan. 29, 2007) (“Where the action has little connection with the chosen forum, less deference is accorded plaintiff’s choice, even if plaintiff is a resident of the forum.”); *Saleh*, 361 F. Supp. 2d at 1157 (“[N]umerous courts have given less deference to the plaintiff’s choice of forum where the action has little connection with the chosen forum.”).

<sup>7</sup> See also *Jaco Envtl. Inc. v. Appliance Recycling Ctrs. of Am., Inc.*, No. C 06-06601, 2007 WL 951274, at \*3 (N.D. Cal. Mar. 27, 2007) (“As deference to a plaintiff’s choice of forum decreases, a defendant’s burden to upset the plaintiff’s choice of forum also decreases.”); *AV Media, PTE, Ltd. v. OmniMount Sys., Inc.*, No. C 06-3805, 2006 WL 2850054, at \*3 (N.D. Cal. Oct. 5, 2006) (same); *Rare Breed Distilling v. Heaven Hill Distilleries*, 2010 WL 335658, at \*2 (N.D.Cal. 2010) (“[t]he degree to which courts defer to the plaintiff’s chosen venue is substantially reduced where the plaintiff’s venue choice is not its residence or where the forum chosen lacks a significant connection to the activities alleged in the complaint.”)



1 Court might not have subpoena power over potential non-party witnesses, many of whom are  
2 located in New Jersey and New York, and this Court might therefore be unable to compel those  
3 witnesses to appear at trial. *See* Kreilmann Decl. ¶ 6; Fed. R. Civ. P. 45(b)(2) (subpoena may be  
4 served at any place within district or at any place outside of district within 100 miles from place  
5 of trial). Transferring the case to the District of New Jersey would ensure that both parties may  
6 invoke the trial court's subpoena power to command the presence of key fact-based witnesses.

7 **CONCLUSION**

8 For the foregoing reasons, Ferrero U.S.A. respectfully requests that this Court transfer  
9 this case to the United States District Court for the District of New Jersey.

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11  
12 Dated: March 24, 2011

Respectfully submitted,

13 WILSON SONSINI GOODRICH & ROSATI  
14 Professional Corporation

15  
16 By: /s/ Dale R. Bish  
Dale R. Bish

17 Attorneys for Defendant Ferrero U.S.A., Inc.  
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